IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUAN LABOY ALMODOVAR, *Plaintiff*, v. OFC. MATTHEW BLAKE, OFC. DONALD MORANT, OFC. STANLEY ROACHE, OFC. KURTIS MILLER , and OFC. GINDER, in their individual capacities, *Defendants*.	:	CIVIL ACTION NO. 08-2163 JURY TRIAL DEMANDED

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

Plaintiff Juan Laboy Mr. Almodovar ("Mr. Almodovar") respectfully moves this Court to charge the jury as proposed on the following pages. Mr. Almodovar reserves the right to supplement and revise these proposed jury instructions at trial.

Introduction

Role of the Jury

Now that you have been sworn, I have the following preliminary instructions for your guidance as jurors in this case.

You will hear the evidence, decide what the facts are, and then apply those facts to the law that I will give to you.

You and only you will be the judges of the facts. You will have to decide what happened. I play no part in judging the facts. You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be. My role is to be the judge of the law. I make whatever legal decisions have to be made during the course of the trial, and I will explain to you the legal principles that must guide you in your decisions. You must follow that law whether you agree with it or not.

3d Cir. Civ. J. Instruction 1.1

All Persons Equal Before the Law

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

3 Fed. Jury Prac. & Instr. § 103.11 (5th ed.)

Introduction

Description of Case; Summary of Applicable Law

In this case, Mr. Almodovar claims that he was assaulted, battered and mistreated in violation of his constitutional rights by several Defendant Lancaster police officers while they were taking Mr. Almodovar into custody on June 9, 2006 and after he was taken into custody; Defendants Roache, Morant, Blake, Miller and Ginder deny those claims. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements that Mr. Almodovar must prove to make his case:

- Mr. Almodovar is suing under Section 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their constitutional rights under color of state law. 3d Cir. Civ. J. Instruction 4.1

  The first element of Mr. Almodovar's claim is that Defendants Roache, Morant, Blake, Miller and Ginder acted under color of state law. This means that Mr. Almodovar must show that Defendants Roache, Morant, Blake, Miller and Ginder were using power that he possessed by virtue of state law. 3d Cir. Civ. J. Instruction 4.4

  The second element of Mr. Almodovar's claim is that Defendants Roache, Morant, Blake, Miller and Ginder deprived him of a constitutional right. 3d Cir. Civ. J. Instruction 4.5

- Mr. Almodovar also contends that Defendants Roache, Morant, Miller and Ginder violated Mr. Almodovar's right to be free from unreasonable and excessive force during his arrest and that Defendants Roache, Morant, Miller and Ginder should be liable for that violation because they failed to intervene to stop the violation. Defendants Roache, Morant, Miller and Ginder are liable for that violation if Mr. Almodovar has proven all of the following four things by a preponderance of the evidence: (1) One of the Defendant Officers violated Mr. Almodovar's right to be free from unreasonable and excessive force during his arrest; (2) Defendants Roache, Morant, Miller and Ginder had a duty to intervene; (3) Defendants Roache, Morant, Miller and Ginder had a reasonable opportunity to intervene; and (4) Defendants Roache, Morant, Miller and Ginder failed to intervene. 3d Cir. Civ. J. Instruction 4.6.2

- Additionally, Mr. Almodovar states that Defendants Roache and Ginder assaulted him. In order for Defendants Roache and Ginder to be held responsible for the commission of an assault against Mr. Almodovar, you must find:
  First, that they intended to put Mr. Almodovar in reasonable and immediate fear of a harmful or offensive contact with his body; and
  Second, that Mr. Almodovar, as a result of Defendants Roache and Ginder's act, was put in reasonable and immediate fear of such contact. Pa. SSJI (Civ) 13.01
- Next, Mr. Almodovar claims that Defendants Roache and Ginder battered him. In order for Defendants Roache, Morant, Blake or Ginder to be held responsible for committing a battery against Mr. Almodovar, you must find:
  First, that Defendants Roache, Morant, Blake or Ginder intended to cause a harmful or offensive contact with the body of Mr. Almodovar or that Defendants

Roache, Morant, Blake or Ginder intended to put Mr. Almodovar in reasonable and immediate fear of a harmful or offensive contact with his body, and Second, that Defendants Roache, Morant, Blake or Ginder's acts directly or indirectly resulted in a harmful or offensive contact with Mr. Almodovar's body. Pa. SSJI (Civ) 13.02

- Mr. Almodovar asserts that Defendant Officers intentionally inflicted emotional distress upon him.

  If you find that Defendants Roache, Morant, Blake, Miller or Ginder conducted himself in an extreme and outrageous manner and that conduct intentionally or recklessly caused severe emotional distress to Mr. Almodovar, you may compensate Mr. Almodovar for this injury. Pa. SSJI (Civ) 13.22

3d Cir. Civ. J. Instruction 1.2

Introduction

Conduct of the Jury

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial and until you have heard all of the evidence and retired to the jury room to deliberate, you are not to discuss the case with anyone, not even among yourselves. If anyone should try to talk to you about the case, including a fellow juror, bring it to my attention promptly. There are good reasons for this ban on discussions, the most important being the need for you to keep an open mind throughout the presentation of evidence.

If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator, or the like, remember it is because they are not supposed to talk or visit with you, either. That is why you are asked to wear your juror tags. It shows that you are someone who is not to be approached in any way.

Second, do not read or listen to anything related to this case that is not admitted into evidence. By that I mean, if there is a newspaper article or radio or television report relating to this case, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own on matters relating to the case or this type of case. Do not do any research on the internet, for example. You are to decide the case upon the evidence presented at trial.

Again, do not reach any conclusion on the claims or defenses until all of the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

3d Cir. Civ. J. Instruction 1.3

Introduction

Bench Conferences

During the trial it may be necessary for me to talk with the lawyers out of your hearing by having a bench conference. If that happens, please be patient.

We are not trying to keep important information from you. These conferences are necessary for me to fulfill my responsibility, which is to be sure that evidence is presented to you correctly under the law.

We will, of course, do what we can to keep the number and length of these conferences to a minimum. While we meet, I will invite you to stand up and stretch and take a short break or perhaps even call a recess if it is a lengthy issue, and permit you to go downstairs for a break.

I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

3d Cir. Civ. J. Instruction 1.4

Introduction

Evidence

The evidence from which you are to find the facts consists of the following:

1. The testimony of the witnesses;

2. Documents and other things received as exhibits;

3. Any facts that are stipulated--that is, formally agreed to by the parties; and

4. Any facts that are judicially noticed--that is, facts I say you must accept as true even without other evidence.

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the parties in this case;

2. Objections by lawyers;

3. Any testimony I tell you to disregard; and

4. Anything you may see or hear about this case outside the courtroom.

You must make your decision based only on the evidence that you see and hear in court. Do not let rumors, suspicions, or anything else that you may see or hear outside of court influence your decision in any way.

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

There are rules that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence, and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. This simply means that the lawyer is requesting that I make a decision on a particular rule of evidence. You should not be influenced by the fact that an objection is made. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe that evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

Also, certain testimony or other evidence may be ordered struck from the record and you will be instructed to disregard this evidence. Do not consider any testimony or other evidence that gets struck or excluded. Do not speculate about what a witness might have said or what an exhibit might have shown.

3d Cir. Civ. J. Instruction 1.5

Introduction

Direct and Circumstantial Evidence

There are two types of evidence that you may use in reaching your verdict. One type of evidence is called "direct evidence." An example of "direct evidence" is when a witness testifies about something that the witness knows through his own senses — something the witness has seen, felt, touched or heard or did. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining. Another form of direct evidence is an exhibit where the fact to be proved is its existence or current condition.

The other type of evidence is circumstantial evidence. "Circumstantial evidence" is proof of one or more facts from which you could find another fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

You should consider both kinds of evidence that are presented to you. The law makes no distinction in the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence.

3d Cir. Civ. J. Instruction 1.6

Introduction

Credibility of Witnesses

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. "Credibility" means whether a witness is worthy of belief. You may believe everything a witness says or only part of it or none of it. In deciding what to believe, you may consider a number of factors, including the following:

(1) the opportunity and ability of the witness to see or hear or know the things the witness testifies to;

(2) the quality of the witness's understanding and memory;

(3) the witness's manner while testifying;

(4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice;

(5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence;

(6) how reasonable the witness's testimony is when considered in the light of other evidence that you believe; and

(7) any other factors that bear on believability.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.

3d Cir. Civ. J. Instruction 1.7

Introduction

Jury Questions for Witnesses

Only the lawyers and I are allowed to ask questions of witnesses. You are not permitted to ask questions of witnesses.

3d Cir. Civ. J. Instruction 1.8

Introduction

Note-Taking By Jurors

If you wish, you may take notes during the presentation of evidence, the summations of attorneys at the conclusion of the evidence, and during my instructions to you on the law. My Courtroom deputy will arrange for pens, pencils, and paper. Remember that your notes are for your own personal use -- they are not to be given or read to anyone else.

As you see, we have a court reporter here who will be transcribing the testimony during the course of the trial. But you should not assume that the transcripts will be available for your review during your deliberations. Nor should you consider notes that you or fellow jurors may take as a kind of written transcript. Instead, as you listen to the testimony, keep in mind that you will be relying on your recollection of that testimony during your deliberations. Here are some other specific points to keep in mind about note taking:

> Note-taking is permitted, not required. Each of you may take notes. No one is required to take notes.
>
> Be brief. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships. Overuse of note-taking may be distracting. You must determine the credibility of witnesses; so you must observe the demeanor and appearance of each person on the witness stand. Note-taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made an observation.
>
> Do not use your notes, or any other juror's notes, as authority to persuade fellow

jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. As I mentioned earlier, your notes are not official transcripts. They are not evidence, and they are by no means a complete outline of the proceedings or a list of the highlights in the trial. They are valuable, if at all, only as a way to refresh your memory. Your memory is what you should be relying on when it comes time to deliberate and render your verdict in this case. You therefore are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial. Notes are not to be used in place of the evidence.

Do not take your notes away from court. I repeat, at the end of each day, please leave your notes in the jury room. If you do take notes, take them with you each time you leave the courtroom and please leave them in the jury room when you leave at night. At the conclusion of the case, after you have used your notes in deliberations, a court officer will collect and destroy them, to protect the secrecy of your deliberations."

3d Cir. Civ. J. Instruction 1.9

Introduction

Preponderance of the Evidence

This is a civil case. Mr. Almodovar is the party who brought this lawsuit. Defendants Roache, Morant, Blake, Miller and Ginder are the parties against whom the lawsuit was filed. Mr. Almodovar has the burden of proving his case by what is called the preponderance of the evidence. That means Mr. Almodovar has to prove to you, in light of all the evidence, that what he claims is more likely so than not so. To say it differently: if you were to put the evidence favorable to Mr. Almodovar and the evidence favorable Defendants Roache, Morant, Blake, Miller and Ginder on opposite sides of the scales, Mr. Almodovar would have to make the scales tip somewhat on his side. If Mr. Almodovar fails to meet this burden, the verdict must be for Defendants Roache, Morant, Blake, Miller and Ginder. If you find after considering all the evidence that a claim or fact is more likely so than not so, then the claim or fact has been proved by a preponderance of the evidence.

In determining whether any fact has been proved by a preponderance of evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

On certain issues, called affirmative defenses, Defendants Roache, Morant, Blake, Miller and Ginder have the burden of proving the elements of the defense by a preponderance of the evidence. I will instruct you on the facts that will be necessary for you to find on this affirmative defense. An affirmative defense is proven if you find, after considering all evidence in the case, that Defendants Roache, Morant, Blake, Miller and Ginder have succeeded in proving that the required facts are more likely so than not so.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard of proof and it applies only to criminal cases. It does not apply in civil cases such as this. So you should put it out of your mind.

3d Cir. Civ. J. Instruction 1.10; 4.2

Introduction

Description of Trial Proceedings

The trial will proceed in the following manner:

First, the attorneys for Mr. Almodovar will make an opening statement to you. Next, the attorney for Defendants Roache, Morant, Blake, Miller and Ginder may make an opening statement. What is said in the opening statements is not evidence, but is simply an outline to help you understand what each party expects the evidence to show.

After the attorneys have made their opening statements, then each party is given an opportunity to present its evidence.

Mr. Almodovar goes first because Mr. Almodovar has the burden of proof. Mr. Almodovar will present witnesses whom counsel for Defendants Roache, Morant, Blake, Miller and Ginder may cross-examine, and Mr. Almodovar may also present evidence. Following Mr. Almodovar's case, Defendants Roache, Morant, Blake, Miller and Ginder may present evidence. Counsel for Mr. Almodovar may cross-examine witnesses for the defense. After the parties' main case is presented, they may be permitted to present what is called rebuttal evidence.

After all the evidence has been presented, I will instruct you on the law and then the attorneys will present to you closing arguments to summarize and interpret the evidence in a way that is helpful to their clients' positions. As with opening statements, closing arguments are not evidence. After that you will retire to the jury room to deliberate on your verdict in this case.

3d Cir. Civ. J. Instruction 1.12

During Trial

Use of Deposition

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

The deposition of Defendant Stanley Roache which was taken on May 21, 2010 is about to be presented to you by a video. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

3d Cir. Civ. J. Instruction 2.5

During Trial

Use of Deposition

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

The deposition of James Herr, M.D., which was taken on March 17, 2010, is about to be presented to you by a video. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

3d Cir. Civ. J. Instruction 2.5

During Trial

Striking Evidence

I have ordered that [describe the evidence] be struck from the record and I am instructing you that you must disregard that information [testimony]. That means that when you are deciding the case, you must not consider that information [testimony] in any way.

3d Cir. Civ. J. Instruction 2.9

During Trial

Recess Admonition

We are about to take our first recess. During this recess and any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, do not tell your fellow jurors but tell me about it immediately. Do not read, watch or listen to any news reports of the trial, or conduct any research or investigation, including on the Internet. Finally, remember to keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

If you need to speak with me about anything, simply give a signed note to [identify court personnel] to give to me.

I will not repeat these admonitions each time we recess or adjourn, but you will be reminded of them on occasion.

3d Cir. Civ. J. Instruction 2.14

General Introduction

Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

3 Fed. Jury Prac. & Instr. § 103.01 (5th ed.)

Close of Evidence

Section 1983 Introductory Instruction

Mr. Almodovar is suing under Section 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their constitutional rights under color of state law.

3d Cir. Civ. J. Instruction 4.1

Close of Evidence

Section 1983 –

Excessive Force (Including Some Types of Deadly Force) –

Stop, Arrest, or other "Seizure"

The Fourth Amendment to the United States Constitution protects persons from being subjected to excessive force while being arrested. In other words, a law enforcement official may only use the amount of force necessary under the circumstances to make the arrest. Every person has the constitutional right not to be subjected to excessive force while being arrested, even if the arrest is otherwise proper.

In this case, Mr. Almodovar claims that Defendants Roache, Blake, Morant and Ginder used excessive force when they arrested Mr. Almodovar. In order to establish that Defendants Roache, Blake, Morant, and Ginder used excessive force, Mr. Almodovar must prove both of the following by a preponderance of the evidence:

First: Defendants Roache, Blake, Morant, or Ginder intentionally committed certain acts.

Second: Those acts violated Mr. Almodovar's Fourth Amendment right not to be subjected to excessive force.

In determining whether Defendants Roache, Blake, Morant, and Ginder's acts constituted excessive force, you must ask whether the amount of force Defendants Roache, Blake, Morant, and Ginder used was the amount which a reasonable officer would have used in making the arrest under similar circumstances. You should consider all the relevant facts and circumstances that Defendants Roache, Blake, Morant, and Ginder reasonably believed to be true at the time of the arrest. You should consider those facts and circumstances in order to assess whether there was a need for the application of force, and the relationship between that need for force, if any, and the amount of force applied. The circumstances relevant to this assessment can include:

- the severity of the crime at issue;
- whether Mr. Almodovar posed an immediate threat to the safety of Defendants Roache, Blake, Morant, and Ginder or others;
- the possibility that Mr. Almodovar was armed;
- the possibility that other persons subject to the police action were violent or dangerous;
- whether Mr. Almodovar was actively resisting arrest or attempting to evade arrest by flight;
- the duration of Defendants Roache, Blake, Morant, or Ginder's action;
- the number of persons with whom Defendants Roache, Blake, Morant, and Ginder had to contend; and
- whether the physical force applied was of such an extent as to lead to unnecessary injury.

The reasonableness of Defendants Roache, Blake, Morant, and Ginder's acts must be judged from the perspective of a reasonable officer on the scene. The law permits the officer to use only that degree of force necessary to make the arrest. However, not every push or shove by a police officer, even if it may later seem unnecessary in the peace and quiet of this courtroom, constitutes excessive force. The concept of reasonableness makes allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are sometimes tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

Mr. Almodovar must prove that Defendants Roache, Blake, Morant, and Ginder intended to commit the acts in question; but apart from that requirement, Defendants Roache, Blake, Morant, and Ginder's actual motivation is irrelevant. If the force Defendants Roache, Blake, Morant, or Ginder used was unreasonable, it does not matter whether they had good motivations. And an officer's improper motive will not establish excessive force if the force used was objectively reasonable.

What matters is whether Defendants Roache, Blake, Morant, and Ginder's acts were objectively reasonable in light of the facts and circumstances confronting the defendant.

3d Cir. Civ. J. Instruction 4.9

Close of Evidence

Section 1983 – Elements of Claim

Mr. Almodovar must prove both of the following elements by a preponderance of the evidence in order to prevail:

First: Defendants Roache, Morant, Blake, Miller and/or Ginder acted under color of state law.

Second: While acting under color of state law, Defendants Roache, Morant, Blake, Miller and/or Ginder deprived Mr. Almodovar of a constitutional right.

I will now give you more details on action under color of state law, after which I will tell you the elements Mr. Almodovar must prove to establish the violation of his constitutional right.

3d Cir. Civ. J. Instruction 4.3

Close of Evidence

Section 1983 – Action under Color of State Law

The first element of Mr. Almodovar's claim is that Defendants Roache, Morant, Blake, Miller and Ginder acted under color of state law. This means that Mr. Almodovar must show that Defendants Roache, Morant, Blake, Miller and Ginder were using power that they possessed by virtue of state law.

A person can act under color of state law even if the act violates state law. The question is whether the person was clothed with the authority of the state, by which I mean using or misusing the authority of the state.

By "state law," I mean any statute, ordinance, regulation, custom or usage of any state. And when I use the term "state," I am including any political subdivisions of the state, such as a county or municipality, and also any state, county or municipal agencies.

3d Cir. Civ. J. Instruction 4.4

Close of Evidence

Section 1983 – Action under Color of State Law –

Action under Color of State Law Is Not in Dispute

Because Defendants Roache, Morant, Blake, Miller and Ginder were officials of the city of Lancaster at the relevant time, I instruct you that they were acting under color of state law. In other words, this element of Mr. Almodovar's claim is not in dispute, and you must find that this element has been established.

3d Cir. Civ. J. Instruction 4.4.1

Close of Evidence

Section 1983 – Deprivation of a Federal Right

The second element of Mr. Almodovar's claim is that Defendants Roache, Morant, Blake, Miller and/or Ginder deprived him of a constitutional right.

Under the Fourth Amendment to the United States Constitution, Mr. Almodovar had a right to be free from unreasonable and excessive force during his arrest.

Physical injury is relevant but it is not a prerequisite to Mr. Almodovar's claim. The absence of physical injury does not necessarily signify that the force has not been excessive.

3d Cir. Civ. J. Instruction 4.5; Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997).

Close of Evidence

Liability in Connection with the Actions of Another – Non-Supervisory Officials – Failure to Intervene

Mr. Almodovar contends that Defendants Roache, Morant, Miller and Blake violated Mr. Almodovar's right to be free from unreasonable and excessive force during his arrest and that Defendants Roache, Morant, Miller and Blake should be liable for that violation because they failed to intervene to stop the violation.

Defendants Roache, Morant, Miller and Blake are liable for that violation if Mr. Almodovar has proven all of the following four things by a preponderance of the evidence:

> First: One of the Defendant Officers violated Mr. Almodovar's right to be free from unreasonable and excessive force during his arrest.
>
> Second: Defendants Roache, Morant, Miller and Blake had a duty to intervene. I instruct you that police officers have a duty to intervene to prevent the use of excessive force by a fellow officer.
>
> Third: Defendants Roache, Morant, Miller and Blake had a reasonable opportunity to intervene.
>
> Fourth: Defendants Roache, Morant, Miller and Blake failed to intervene.

3d Cir. Civ. J. Instruction 4.6.2

Close of Evidence

Section 1983 – Damages –

Compensatory Damages

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not Defendants Roache, Morant, Blake, Miller and/or Ginder should be held liable.

If you find Defendants Roache, Morant, Blake, Miller and/or Ginder liable, then you must consider the issue of compensatory damages. You must award Mr. Almodovar an amount that will fairly compensate him for any injury he actually sustained as a result of the conduct of Defendants Roache, Morant, Blake, Miller and/or Ginder.

Mr. Almodovar must show that the injury would not have occurred without Defendants Roache, Morant, Blake, Miller or Ginder's act or omission. Mr. Almodovar must also show that Defendants Roache, Morant, Blake, Miller or Ginder's act or omission played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of Defendants Roache, Morant, Blake, Miller or Ginder's act or omission. There can be more than one cause of an injury. To find that Defendants Roache, Morant, Blake, Miller or Ginder's act or omission caused Mr. Almodovar's injury, you need not find that Defendants Roache, Morant, Blake, Miller or Ginder's act or omission was the nearest cause, either in time or space. However, if Mr. Almodovar's injury was caused by a later, independent event that intervened between Defendants Roache, Morant, Blake, Miller or Ginder's act or omission and Mr. Almodovar's injury, Defendants Roache, Morant, Blake, Miller and Ginder are not liable unless the injury was reasonably foreseeable by Defendants Roache, Morant, Blake, Miller or Ginder.

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence. Plaintiff has the burden of proving compensatory damages by a preponderance of the evidence.

Mr. Almodovar claims the following items of damages:

- Physical harm to Mr. Almodovar during and after the events at issue, including ill health, physical pain, disability, disfigurement, or discomfort, and any such physical harm that Mr. Almodovar is reasonably certain to experience in the future. In assessing such harm, you should consider the nature and extent of the injury and whether the injury is temporary or permanent.

- Emotional and mental harm to Mr. Almodovar during and after the events at issue, including fear, humiliation, and mental anguish, nightmares, insomnia, depression and paranoia and any such emotional and mental harm that Mr. Almodovar is reasonably certain to experience in the future.

- The present value of such care and supplies that Mr. Almodovar is reasonably certain to need in the future.

In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.

3d Cir. Civ. J. Instruction 4.8.1

Close of Evidence

Section 1983 – Damages –

Nominal Damages

If you return a verdict for Mr. Almodovar but Mr. Almodovar has failed to prove compensatory damages, then you must award nominal damages of $ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if he suffered no actual injury. Nominal damages of $1.00 are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

By making the deprivation of rights actionable without proof of actual injury, the law recognizes the importance to society that those constitutional rights be scrupulously observed. The mere fact a constitutional deprivation has been shown to have occurred is an injury to the person entitled to enjoy that right, even when actual damages flow from the deprivation.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

3d Cir. Civ. J. Instruction 4.8.2; 3B Fed. Jury Prac. & Instr. § 165.70 (5th ed.); Carey v. Piphus, 435 U.S. 247, 266 (1978); Memphis Community School Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986); Allah v. Al-Hafeez, 226 F.3d 247, 252 (3d Cir. 2000).

Close of Evidence

Section 1983 – Damages –

Punitive Damages

In addition to compensatory or nominal damages, you may consider awarding Mr. Almodovar punitive damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury and so receives nominal rather than compensatory damages.

You may only award punitive damages if you find that Defendants Roache, Morant, Blake, Miller or Ginder acted maliciously or wantonly in violating Mr. Almodovar's federally protected rights. In this case there are multiple defendants. You must make a separate determination whether each defendant acted maliciously or wantonly.

- A violation is malicious if it was prompted by ill will or spite towards the plaintiff. A defendant is malicious when he consciously desires to violate federal rights of which he is aware, or when he consciously desires to injure the plaintiff in a manner he knows to be unlawful. A conscious desire to perform the physical acts that caused plaintiff's injury, or to fail to undertake certain acts, does not by itself establish that a defendant had a conscious desire to violate rights or injure plaintiff unlawfully.
- A violation is wanton if the person committing the violation recklessly or callously disregarded the plaintiff's rights.

If you find that it is more likely than not that Defendants Roache, Morant, Blake, Miller or Ginder acted maliciously or wantonly in violating Mr. Almodovar's federal rights, then you may award punitive damages against a particular defendant.

However, an award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion. But remember that you cannot award punitive damages unless you have found that Defendants Roache, Morant, Blake, Miller or Ginder acted maliciously or wantonly in violating Mr. Almodovar's federal rights.

If you have found that a particular defendant acted maliciously or wantonly in violating Mr. Almodovar's federal rights, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or wanton violation of the plaintiff's federal rights, or to deter the defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish a particular defendant. You should also consider whether actual damages standing alone are sufficient to deter or prevent Defendants Roache, Morant, Blake, Miller or Ginder from again performing any wrongful acts he may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter other persons from performing wrongful acts similar to those a particular defendant may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which a particular defendant should be punished for his wrongful conduct toward Mr. Almodovar, and the degree to which an award of one sum or another will deter a particular defendant or others from committing similar wrongful acts in the future.

In considering the purposes of punishment and deterrence, you should consider the nature of the defendant's action. For example, you are entitled to consider whether a defendant's act was violent or non-violent; whether the defendant's act posed a risk to health or safety; whether the defendant acted in a deliberately deceptive manner; and whether the defendant engaged in repeated misconduct, or a single act. You should also consider the amount of harm actually caused by the defendant's act, as well as the harm the defendant's act could have caused and the harm that could result if such acts are not deterred in the future.

3d Cir. Civ. J. Instruction 4.8.3

Close of Evidence

Assault

An assault is an act done with the intent to put another in reasonable and immediate fear of a harmful or offensive contact with his or her body and that does, in fact, cause such fear.

To commit an assault, it is not necessary that the person actually intend to inflict a harmful or offensive contact with the body of another. It is enough that the person intend to cause only a fear of such contact.

In order for Defendants Roache or Ginder to be held responsible for the commission of an assault against Mr. Almodovar, you must find:

- First, that Defendants Roache or Ginder intended to put Mr. Almodovar in reasonable and immediate fear of a harmful or offensive contact with his body; and
- Second, that Mr. Almodovar, as a result of Defendants Roache or Ginder's act, was put in reasonable and immediate fear of such contact.

Pa. SSJI (Civ) 13.01

Close of Evidence

Battery

A battery is an act done with the intent to cause a harmful or offensive contact with the body of another or an act done with the intent to put another in reasonable and immediate fear of a harmful or offensive contact with his or her body and that directly or indirectly results in the harmful or offensive contact with the body of another.

In order for Defendants Roache, Morant, Blake or Ginder to be held responsible for committing a battery against Mr. Almodovar, you must find:

- First, that Defendants Roache, Morant, Blake or Ginder intended to cause a harmful or offensive contact with the body of Mr. Almodovar or that Defendants Roache, Morant, Blake or Ginder intended to put Mr. Almodovar in reasonable and immediate fear of a harmful or offensive contact with his body, and
- Second, that Defendants Roache, Morant, Blake or Ginder's acts directly or indirectly resulted in a harmful or offensive contact with Mr. Almodovar's body.

A body contact is offensive if it would offend a reasonable person's personal sense of dignity.

Pa. SSJI (Civ) 13.02

Close of Evidence

Outrageous Conduct Causing Severe Emotional Distress

A person who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for any bodily harm to the other that results from the emotional distress.

Extreme and outrageous conduct is that which goes beyond all possible bounds of decency and would be regarded as atrocious and utterly intolerable in a civilized community.

Emotional distress includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry. Severe means that it is such that no reasonable person could be expected to endure it. In determining whether the emotional distress suffered by the plaintiff was severe, you may consider both the intensity of the distress and its duration.

Pa. SSJI (Civ) 13.03

Close of Evidence

Intentional Infliction of Emotional Distress

If you find that Defendants Roache, Morant, Blake, Miller or Ginder conducted himself in an extreme and outrageous manner and that conduct intentionally or recklessly caused severe emotional distress to Mr. Almodovar, you may compensate Mr. Almodovar for this injury.

Pa. SSJI (Civ) 13.22

Close of Evidence

Pre-existing Condition

Damages should be awarded for all injuries caused by the arrest even if:

1. the injuries caused by the arrest were more severe than could have been foreseen because of the plaintiff's prior physical condition; or

2. a preexisting medical condition was aggravated by the occurrence.

If you find that Mr. Almodovar did have a preexisting condition that was aggravated by the acts or omissions of Defendants Roache, Morant, Blake, Miller or Ginder, Defendants Roache, Morant, Blake, Miller or Ginder are responsible for any aggravation caused by the occurrence.

I remind you that Defendants Roache, Morant, Blake, Miller or Ginder can be held responsible only for those injuries or the aggravation of a prior injury or condition that you find was factually caused by the arrest.

Pa. SSJI (Civ) 6.03

Close of Evidence

Past and Future Non-Economic Loss

Mr. Almodovar has made a claim for a damage award for past and for future non-economic loss. There are four items that make up a damage award for non-economic loss, both past and future: (1) pain and suffering; (2) embarrassment and humiliation; (3) loss of ability to enjoy the pleasures of life; and (4) disfigurement.

First, Mr. Almodovar must have experienced pain and suffering in order to be able to claim damage awards for past non-economic loss and for future non-economic loss. You are instructed that Mr. Almodovar is entitled to be fairly and adequately compensated for all physical pain, mental anguish, discomfort, inconvenience, and distress that you find his has endured from the time of the injury until today and that Mr. Almodovar is also entitled to be fairly and adequately compensated for all physical pain, mental anguish, discomfort, inconvenience, and distress you find he will endure in the future as a result of his injuries.

Second, Mr. Almodovar must have experienced embarrassment and humiliation in order to claim non-economic loss. Mr. Almodovar is entitled to be fairly and adequately compensated for such embarrassment and humiliation as you believe he has endured and will continue to endure in the future as a result of his injuries.

Third, Mr. Almodovar must suffer loss of enjoyment of life. Mr. Almodovar is entitled to be fairly and adequately compensated for the loss of his ability to enjoy any of the pleasures of life as a result of the injuries from the time of the injuries until today and to be fairly and adequately compensated for the loss of his ability to enjoy any of the pleasures of life in the future as a result of his injuries.

Fourth, there must be disfigurement. The disfigurement that Mr. Almodovar has sustained is a separate item of damages recognized by the law. Therefore, in addition to any sums you award for pain and suffering, for embarrassment and humiliation, and for loss of enjoyment of life, the plaintiff is entitled to be fairly and adequately compensated for the disfigurement he has suffered from the time of the injury to the present and that he will continue to suffer during the future duration of his life.

In considering Mr. Almodovar's claims for damage awards for past and future non-economic loss, you will consider the following factors: (1) the age of Mr. Almodovar; (2) the severity of the injuries; (3) whether the injuries are temporary or permanent; (4) the extent to which the injuries affect the ability of Mr. Almodovar to perform basic activities of daily living and other activities in which Mr. Almodovar previously engaged; (5) the duration and nature of medical treatment; (6) the duration and extent of the physical pain and mental anguish that Mr. Almodovar has experienced in the past and will experience in the future; (7) the health and physical condition of Mr. Almodovar prior to the injuries; and (8) in the case of disfigurement, the nature of the disfigurement and the consequences for Mr. Almodovar.

Pa. SSJI (Civ) 6.09

Damages – Life Expectancy

If you find that the Mr. Almodovar's injuries will continue beyond today, you must determine the life expectancy of the plaintiff. According to statistics compiled by the United States Department of Health and Human Services, the average life expectancy of all persons of the plaintiff's age at the time of arrest, sex, and race was 79 years. This figure is offered to you only as a guide, and you are not bound to accept it if you believe that Mr. Almodovar would have lived longer or less than the average individual in his category. In reaching this decision, you are to consider Mr. Almodovar's health prior to the accident, his manner of living, his personal habits, and other factors that may have affected the duration of his life.

Pa. SSJI (Civ) 6.21

Close of Evidence

Number of Witnesses

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.

You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses that does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence producing such belief in your minds.

The test is not which side brings the greater number of witnesses or takes the most time to present its evidence, but which witnesses and which evidence appeal to your minds as being most accurate and otherwise trustworthy.

3d Cir. Civ. J. Instruction 3.2; 3 Fed. Jury Prac. & Instr. § 104.54 (5th ed.)

Close of Evidence

Opinion Testimony

You have heard testimony containing opinions from Richard Garipoli. In weighing this opinion testimony, you may consider his qualifications, the reasons for his opinions, and the reliability of the information supporting those opinions, as well as the factors I have previously mentioned for weighing the testimony of any other witness. The opinion of Richard Garipoli should receive whatever weight and credit, if any, you think appropriate, given all the other evidence in the case.

In deciding whether to accept or rely upon the opinion of Garipoli, you may consider any bias that Garipoli may have, including any bias that may arise from evidence that Garipoli has been or will be paid for reviewing the case and testifying or from evidence that Garipoli testifies regularly and makes a large portion of his income from testifying in court.

3d Cir. Civ. J. Instruction 2.11

Close of Evidence

Deliberations

When you retire to the jury room to deliberate, you may take with you your notes and the exhibits that the Court has admitted into evidence. You should select one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in open court.

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide if, under the appropriate burden of proof, the parties have established their claims. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

As jurors, you have a duty to consult with each other and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after a full and impartial consideration of all of the evidence with your fellow jurors. Listen to each other carefully. In the course of your deliberations, you should feel free to re-examine your own views and to change your opinion based upon the evidence. But you should not give up your honest convictions about the evidence just because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

When you start deliberating, do not talk to the jury officer, to me or to anyone but each other about the case. If you have any questions or messages for me, you must write them down on a piece of paper, have the foreperson sign them, and give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take some time to get back to you.

One more thing about messages. Never write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that a certain number is voting one way or another. Your votes should stay secret until you are finished.

Your verdict must represent the considered judgment of each juror. In order for you as a jury to return a verdict, each juror must agree to the verdict. Your verdict must be unanimous.

A form of verdict has been prepared for you. It has a series of questions for you to answer. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will fill it in, and have your foreperson date and sign the form. You will then return to the courtroom and your foreperson will give your verdict. Unless I direct you otherwise, do not reveal your answers until you are discharged. After you have reached a verdict, you are not required to talk with anyone about the case unless I order you to do so.

In order for you as a jury to answer a question, each juror must agree to the answer. In other words, your answers to each question must be unanimous. Your foreperson will write the unanimous answer of the jury in the space provided after each question, and will date and sign the form of special verdict when completed.

Nothing said in the verdict form is meant to suggest what your verdict should be. You alone have the responsibility for deciding the verdict.

Once again, I want to remind you that nothing about my instructions and nothing about the form of verdict is intended to suggest or convey in any way or manner what I think your verdict should be. It is your sole and exclusive duty and responsibility to determine the verdict.

3d Cir. Civ. J. Instruction 3.1; 3d Cir. Civ. J. Instruction Appendix One

Deliberations

Read-Backs of Trial Testimony

At your request, I have decided to have a transcript of read to you in order to assist you in your deliberations. I remind you that you must focus on all of the testimony and evidence presented at the trial. You may not give undue weight to the testimony that is read back to you.

3d Cir. Civ. J. Instruction 3.3

Deliberations

Deadlock

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so consistent with your individual judgments. Each of you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you must be open to their opinions. You should not be influenced to vote a certain way, however, by the single fact that a majority of the jurors, or any of them, will vote in a certain way. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinions of the other jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced that those views are wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to reexamine your own views.

Remember that you are not partisans; you are judges — judges of the facts. Your only interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

If you should fail to agree on a verdict, the case is left open and must be resolved at a later time. There is no reason to think that another trial would be conducted in a better way or that a different jury would decide it any better. Any future jury must be selected in the same manner and from the same source as you.

We try cases to dispose of them and to reach a common conclusion if it is consistent with the conscience of each member of the jury. I suggest that, in deliberating, you each recognize that you are not infallible, that you listen to the opinions of the other jurors and that you do so carefully with a view to reaching a common conclusion, if you can. You may take all the time that you feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now retire and continue your deliberations.

3d Cir. Civ. J. Instruction 3.4

Respectfully Submitted,

BLANK ROME LLP

BY: /s/ Ryan P. Stewart_____
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Dated: May 19, 2010

CERTIFICATE OF SERVICE

I, Ryan P. Stewart, Esquire, hereby state that on this 19th day of May, 2010, a true and correct copy of the Plaintiff's Proposed Jury Instructions was served by means authorized by the Federal Rules of Civil Procedure and the Local Rules of the Federal District Court for the Eastern District of Pennsylvania upon the following:

Robert G. Hanna, Jr., Esquire
225 Market Street, Suite 304
P.O. Box 1245
Harrisburg, PA 17108-1245

/s/ Ryan P. Stewart_____
Ryan P. Stewart